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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ANTONY GLYN WILSON, Defendant and Appellant.	D075612 (Super. Ct. No. SCN067569)

APPEAL from an order of the Superior Court of San Diego County, Harry M. Elias, Judge. Affirmed.

Anthony J. Dain, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Lynne G. McGinnis and Quisteen S. Shum, Deputy Attorneys General, for Plaintiff and Respondent.

In March 1998, a jury found Antony Glyn Wilson guilty of three counts of attempted, willful murder (counts 1-3; Penal Code, §§ 187, subd. (a) & 664), three counts of assault with a semi-automatic firearm (counts 4-6; § 245, subd. (b)), one count of permitting another person to discharge a firearm from his vehicle (count 7; § 12034, subd. (b)), and one count of possession of a firearm by a felon (count 8; § 12021, subd. (a)(1)). The jury also found true that Wilson was armed with a firearm in the commission or attempted commission of the offenses in counts 1 through 6. (§ 12022, subd. (a)(1).) Following a bifurcated trial, the court found true a prison prior conviction (§ 667.5, subd. (b)), a serious felony prior conviction allegation (§§ 667, subd. (a) & 1192.7, subd. (c)(19)), and six strike prior conviction allegations (§§ 667, subds. (b)-(i)).

The court sentenced Wilson to 32 years to life.

On February 20, 2019, Wilson filed a petition with the superior court seeking to vacate the attempted murder convictions based on newly-enacted Senate Bill No. 1437 (Senate Bill 1437), which provides a procedure for requesting that the court vacate a murder or felony murder conviction that was based on the natural and probable consequences doctrine. The superior court denied the petition on the ground that Wilson was not statutorily eligible for the relief because he was convicted of attempted murder, not murder. Wilson appeals the court's ruling. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of the underlying matter are not relevant to the issue before us. Nonetheless, to provide some context of the underlying crime, we summarize the facts as

they were described in Wilson's previous, direct appeal, in *People v. Wilson* (Mar. 9, 2000, D031372) [nonpub. opn.] (*Wilson*)).[1]

On the night of September 13, 1997, the backseat passenger of a Chevrolet Blazer driven by Wilson shot at a Nissan Maxima, driven by Brian Buck. (*Wilson, supra*, D031372 at pp. *3-4.) "[W]hile Buck was driving [the Maxima] from the Wal-Mart to get onto the freeway, he irritated a couple of girls in a red 200SX Nissan who tried to get over in the turn lane in front of him. When he eventually let the red car in,[2] the driver gave him 'the finger.' At the next light, the girls exchanged words with Buck's brother, who apologized for the earlier problem. Once on the freeway, Buck's Maxima in the middle lane and the girls in the red Nissan in the slow lane, engaged in a 'cat and mouse' game of speeding up and slowing down. A short time later, Buck heard loud 'banging' noises from the left side of his car, as if someone were throwing things. He first heard one bang, followed by three rapid bangs after a split-second pause. When he looked to his left, he saw the right rear passenger window of the Blazer rolled down about four or five inches. He heard a brown complected man in the Blazer scream, 'Fuck you[,]' and his brother and [passenger] Woolcott yell, 'get the hell out of here.' " (*Wilson, supra*, D031372 at p. *7.)

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1 We grant Wilson's unopposed request for judicial notice of the record on appeal and our prior opinion in this matter, Case No. D031372.

2 "Buck's brother and Woolcott[, another passenger,] each testified Buck cut the red Nissan off at the light before the intersection where the cars turned onto the freeway." (*Wilson, supra*, D031372 at p. *7.)

Two of the Maxima's passengers testified that they heard loud banging noises from the left side of the car and saw the right rear passenger of the window of the Blazer rolled down about four or five inches. Two others testified that they saw muzzle flashes coming from the Blazer's rear passenger's hand. (*Wilson, supra*, D031372 at pp. *7-8.)

Investigators traced the license plate number of the Blazer to Wilson, and they found evidence of a gray watch cap, which matched the description given by witnesses of a cap the Blazer's driver was wearing. Investigators also found a loaded nine-millimeter Glock semiautomatic handgun, which was hidden in the metal cover behind the folded rear passenger seat, as well as an inverted latex glove on the back passenger floorboard, 11 latex gloves in the glove compartment, and a boxful of similar gloves in the rear cargo portion of the vehicle. (*Wilson, supra*, D031372 at pp. *4-6.)

During closing arguments, the prosecutor explained that Wilson could be guilty of attempted murder without specific intent to kill under the natural and probable consequences doctrine, as long as he had the intent to commit the act of assault with a firearm. The prosecutor also commented that "by his actions as an aider and abettor in this case[, Wilson] intended people to be killed," then reiterated the elements required to be guilty of attempted murder as a natural and probable consequence of assault. The jury found Wilson guilty of willfully and unlawfully attempting murder on three counts.

The jury found Wilson guilty on all the other counts, as well. The court sentenced him to 32 years, which included 25 years to life on count 1 for attempted murder (§§ 187, subd. (a), 664) and one year for the firearm enhancement (§ 12022, subd. (a)(1)), as well as concurrent terms of 25 years to life for the attempted murder convictions in counts 2

and 3 and one year for each of those related firearm enhancements, also to run concurrently. The court also awarded but stayed sentences for counts 4 through 8, and it stayed the firearm enhancement sentences attached to counts 4 through 6. (§ 654.) The court awarded one year for the first prison prior (§ 667.5, subd. (b)), and five years for the serious felony prior (§ 667, subd. (a)), to run consecutively.

Wilson appealed the conviction, and the judgment was affirmed. (*Wilson*, *supra*, D031372 at p.*22.)

In February 2019, following enactment of Senate Bill 1437, Wilson filed a petition with the superior court seeking to vacate the attempted murder convictions and asking for resentencing. The superior court denied his motion, stating Wilson was ineligible for relief because he was not convicted of first or second degree murder. Wilson timely appealed.

DISCUSSION

Senate Bill 1437, which became effective January 1, 2019, eliminated liability for murder based on the natural and probable consequences doctrine. (§§ 188, subd. (a)(3), 189, subd. (e); *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1147 (*Anthony*).) In his appeal, Wilson contends Senate Bill 1437 also applies to attempted murder convictions based on the natural and probable consequences doctrine, and he contends the superior court erroneously denied his petition to vacate the attempted murder convictions. We disagree and affirm.

The interpretation of a statute is a question of law, subject to de novo review. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.) " 'As in any case

involving statutory interpretation, our fundamental task is to determine the Legislature's intent so as to effectuate the law's purpose.' " (*People v. Cole* (2006) 38 Cal.4th 964, 974-975; *People v. Murphy* (2001) 25 Cal.4th 136, 142.) We examine the statutory language and give it a plain and commonsense meaning. (*Cole*, at p. 975.) If the statutory language is unambiguous, then the plain meaning controls. (*Ibid.*) It is only when the language supports more than one reasonable construction that we may look to extrinsic aids like legislative history and ostensible objectives. (*Ibid.*; *In re Young* (2004) 32 Cal.4th 900, 906.)

Here we must determine whether Senate Bill 1437 modifies accomplice liability for attempted murder. We begin by looking at the language of the amended statutes, giving them " ' " 'a plain and commonsense meaning.' " ' " (*People v. Gonzalez* (2017) 2 Cal.5th 1138, 1141.) "We must follow the statute's plain meaning, if such appears, unless doing so would lead to absurd results the Legislature could not have intended." (*People v. Birkett* (1999) 21 Cal.4th 226, 231 (*Birkett*); *People v. Gray* (2014) 58 Cal.4th 901, 906.)

Senate Bill 1437 addressed aspects of felony murder and the natural and probable consequences doctrine (*People v. Martinez* (2019) 31 Cal.App.5th 719, 722), "redefin[ing] 'malice' in section 188. Now, to be convicted of murder, a principal must act with malice aforethought; malice can no long 'be imputed to a person based solely on [his or her] participation in a crime.' (§ 188, subd. (a)(3).)" (*In re R.G.* (2019) 35 Cal.App.5th 141, 144.) Senate Bill 1437 also amended section 189 by adding subdivision (e), which states that a participant in the target felony who did not actually

commit a killing is nonetheless liable for murder if he or she aided, abetted, or assisted the actual killer in first degree murder or was a major participant in the target crime and acted with reckless indifference to human life. (§ 189, subds. (e)(2)-(3).) The result is that Senate Bill 1437 "ensure[s] that murder liability is not imposed on a person who is not the actual killer, did not act with intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (*Anthony, supra*, 32 Cal.App.5th at p. 1147.)

Additionally, Senate Bill 1437 added section 1170.95, which permits "[a] person convicted of felony murder or murder under a natural and probable consequences theory" to petition the sentencing court to vacate the murder conviction and resentence the petitioner on the remaining counts. (§ 1170.95, subd. (a); *In re R.G., supra*, 35 Cal.App.5th at p. 144.)

Division Seven of the Court of Appeal, Second Appellate District recently addressed the question of whether Senate Bill 1437 applies to attempted murder convictions in *People v. Lopez* (2019) 38 Cal.App.5th 1087 (*Lopez*) and concluded it does not. We agree with the reasoning in *Lopez.* The court explained: "[T]here is nothing ambiguous in the language of Senate Bill 1437, which, in addition to the omission of any reference to attempted murder, expressly identifies its purpose as the need 'to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major

participant in the underlying felony who acted with reckless indifference to human life.' [Citation.]" (*Id.* at p. 1104.)

Lopez also points out that the language in section 1170.95 authorizes only those convicted of felony murder or murder under the natural and probable consequences theory to petition for relief, and it authorizes the court to hold a hearing regarding whether to vacate *murder* convictions. (*Lopez*, *supra*, 38 Cal.App.5th at pp. 1104-1105, citing § 1790.95, subds. (a) & (d).) This authorization does not extend beyond murder convictions; the plain language of these statutes neither mentions attempted murder nor offers a procedure for vacating attempted murder convictions based on the natural and probable consequences doctrine. (See *Lopez*, at pp. 1104 -1105; see also §§ 188, 189, 1170.95.)

Additionally, the language of section 189, subdivision (e) suggests the Legislature knowingly excluded attempted murder. Section 189, subdivision (e) states that an underlying felony can be either completed or attempted, but the same sentence omits the word "attempted" in the context of a participant's liability for murder. (§ 189, subd. (e) ["A participant in the perpetration or *attempted perpetration* of a felony listed in subdivision (a) in which a death occurs *is liable for murder* only if one of the following is proven"], italics added.) " 'When the Legislature "has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded." ' [Citation.]" (*People v. Buycks* (2018) 5 Cal.5th 857, 880.)

Moreover, in *Lopez* the court explains that the exclusion of attempted murder from the statutes is consistent with the legislative history: "When describing the proposed

petition process, the Legislature consistently referred to relief being available to individuals charged in a complaint, information or indictment 'that allowed the prosecution to proceed under a theory of first degree felony murder, second degree felony murder, or murder under the natural and probable consequences doctrine' and who were 'sentenced to first degree or second degree murder.' (Assem. Com. on Public Safety, Rep. on Sen. Bill No. 1437 (2017-2018 Reg. Sess.) as amended May 25, 2018, p. 1.) In addition, when discussing the fiscal impact and assessing the likely number of inmates who may petition for relief, the Senate Committee on Appropriations considered the prison population serving a sentence for first and second degree murder and calculated costs based on that number. (See Sen. Com. on Appropriations, Rep on Sen. Bill No. 1437 (2017-2018 Reg. Sess.) as introduced Feb. 16, 2018, p. 3 (Senate Committee Appropriations Report).) The analysis of potential costs did not include inmates convicted of attempted murder." (*Lopez*, *supra*, 38 Cal.App.5th at p. 1105.)

Wilson argues that attempt requires at least the same mens rea as the completed crime. Thus, because a conviction for murder requires proof of malice, which cannot be imputed to a person based only on participation in the target crime, the natural and probable consequences doctrine is no longer a valid basis for an attempted murder charge. The implication is that Senate Bill 1437 repealed the natural and probable consequences doctrine as a basis for aider or abettor liability for attempted murder. However, as the court points out in *Lopez*, offenses charged under the natural and probable consequences doctrine are based on a theory of vicarious liability, not actual or imputed malice; thus, the accomplice to attempted murder does not need to share the

perpetrator's intent. (*Lopez*, *supra*, 38 Cal.App.5th at pp. 1101, 1106 citing *People v. Chiu* (2014) 59 Cal.4th 155, 158, 164, 167.) "As a matter of statutory interpretation, Senate Bill 1437's legislative prohibition of vicarious liability for murder does not, either expressly or impliedly, require elimination of vicarious liability for attempted murder." (*Lopez,* at p. 1106.)

Wilson contends that interpreting Senate Bill 1437 to exclude attempted murder could lead to absurd results because a defendant convicted of aiding and abetting in an assault that leads to murder would be convicted and sentenced only for the assault, while a defendant convicted of aiding and abetting in an assault that leads to attempted murder could be convicted and sentenced both for assault and for attempted murder, resulting in a longer sentence. Moreover, he notes, because some sentence enhancements are available only for the attempted murder and not the underlying crime, those who are convicted of aiding and abetting a target crime that leads to attempted murder could receive lengthy, 25-year sentences, for which they would not be eligible were they only sentenced for the target crime. (See § 12022.53, subds. (a)(1), (18).)

Although he maintains that the Legislature could not have reasonably intended these differences, it is clear from the plain language of Senate Bill 1437 that the Legislature did not intend to include attempted murder in the legislation, however "absurd" the sentencing differences may appear. (*Birkett, supra,* 21 Cal.4th at p. 231 [follow plain meaning unless results are absurd *and* unintended].) The legislative findings and declarations offered in the non-published portion of the bill make clear that the bill was focused only on murder, not attempted murder: "It is necessary to amend the

felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Sen. Bill No. 1437 (2017-2018 Reg. Sess.) Stats. 2018, ch. 1015, § 1, subd. (f).)[3] Moreover, " ' "The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended." [Citations.] ' " (*In re Greg F.* (2012) 55 Cal.4th 393, 407.) If, as Wilson maintains, the sentencing results were not a reflection of this stated intention, the remedy would be legislative. (See *Costa v. Workers' Comp. Appeals Bd.* (1998) 65 Cal.App.4th 1177, 1184 ["[J]udicial review of a statute does not involve a consideration of the legislation's wisdom"].)

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3 We grant the Attorney General's unopposed request for judicial notice of items from the legislative history of Senate Bill 1437.

DISPOSITION

The order is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

AARON, J.